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IN THE

Supreme Court of the United States

UTILITIES COMMISSION,
CITY OF NEW SMYRNA BEACH, FLORIDA,
Petitioner,

v.

TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, AND FLORIDA POWER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does the Energy Policy Act of 1992, which was enacted by Congress to secure the benefits of competition in the wholesale sector of the U.S. electricity industry, preempt an interpretation of Florida law that requires potential wholesale power suppliers to contract to sell all of their output to Florida retail-serving utilities and to demonstrate specific retail need for that output in order to build and operate power plants intended to supply power to the interstate wholesale power market?

2. Does this Court's dormant Commerce Clause jurisprudence prohibit the Florida Supreme Court from requiring out-of-state companies seeking to build wholesale "merchant" power plants in Florida to contract with in-state retail-serving utilities as a condition of obtaining the necessary permits to construct and operate their plants?

PARTIES TO THE PROCEEDING

The following entities are parties to the proceeding in the court below:

Tampa Electric Company; Florida Power Corporation; and Florida Power & Light Company, appellants; Joe Garcia et al., as the Florida Public Service Commission; Utilities Commission, City of New Smyrna Beach, Florida; Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.; PG&E Generating (formerly known as U.S. Generating Company); and Legal Environmental Assistance Foundation, appellees; and Enron North America, *Amicus Curiae*.

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OPINIONS BELOW

The decision of the Supreme Court of Florida, reported as *Tampa Electric Co., et al., v. Joe Garcia, et al.*, 767 So. 2d 428 (Fla. 2000), appears as Appendix A (1a). The Florida court's order denying rehearing appears as Appendix B (17a). The order of the Florida Public Service Commission that was reversed by the Florida court, reported as *In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.*, 99 FPSC 3:401 is included as Appendix C (20a).

JURISDICTION

The initial opinion of the Florida Supreme Court was entered on April 20, 2000. The revised opinion of the Florida Supreme Court was entered on September 28, 2000, and motions for rehearing were denied on that same date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Petitioner, Utilities Commission, City of New Smryna Beach, Florida ("New Smyrna Beach" or "Petitioner") expressly raised the federal statutory and constitutional issues in the Florida Supreme Court. The Florida Supreme Court noted that Petitioner raised the federal statutory issues. *Garcia*, 767 So.2d at 431, 433. The Florida court also acknowledged that New Smyrna Beach presented its federal constitutional claims on appeal. Specifically, the Florida Supreme Court noted Petitioner's argument that "prohibiting Duke [Petitioner's co-applicant at the PSC] from applying directly for a need determination would violate the dormant Commerce Clause of the United States Constitution because such action would unconstitutionally discriminate against out-of-state commerce and burden interstate commerce." *Id.* at 433. The Florida Supreme Court rejected the merits of the federal statutory and constitutional claims. The Florida court

held that "We find no merit in the constitutional arguments advanced by New Smyrna [i.e., Petitioner]." *Id.* at 433. With regard to the federal statutory claims, the Florida court held that "power-plant siting and need determination are areas that Congress has expressly left to the states." *Id.* Because the federal issues were expressly raised and decided on the merits, the judgment below is "final" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 3 of the United States Constitution provides:

> The Congress shall have power
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; . . .

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Pursuant to this Court's Rule 14.1(f), the relevant provisions of the Energy Policy Act of 1992 are included as Appendix D (97a). Also pursuant to Rule 14.1(f), relevant portions of Order 888 of the Federal Energy Regulatory Commission, implementing the Energy Policy Act, ("Order 888") are included as Appendix E (103a).

Section 403.519, Florida Statutes provides in pertinent part:

> **403.519 Exclusive forum for determination of need.**—On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.[1]

Section 403.506(1), Florida Statutes, provides in pertinent part:

> The provisions of this act shall apply to any electrical power plant as defined herein, except that the provisions of this act shall not apply to any electrical power plant or steam generating plant of less than 75 megawatts in capacity . . . . No construction of any new electrical power plant . . . may be undertaken after October 1,

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[1] An "applicant" is defined as "any electric utility which applies for certification pursuant to the provisions of [the Siting Act]." § 403.503(4), Fla. Stat. In turn, "electric utility" is defined in Section 403.503(13), Florida Statutes, as follows:

> "Electric utility" means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

> 1973, without first obtaining certification in the manner as herein provided . . . .

Section 403.507(2)(a)2., Florida Statutes, provides in pertinent part:

> The Public Service Commission shall prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed electrical power plant. The report shall include the commission's determination pursuant to s. 403.519 and may include the commission's comments with respect to any other matters within its jurisdiction.

Section 403.507(3), Florida Statutes, provides in pertinent part:

> A certification hearing shall be held by the designated administrative law judge no later than 300 days after the complete application is filed with the [Florida Department of Environmental Protection]; however, an affirmative determination of need by the Public Service Commission pursuant to s. 403.519 shall be a condition precedent to the conduct of the certification hearing.

STATEMENT OF THE CASE

This case involves the attempt by one state to exclude from participation in interstate commerce—specifically, from commerce in the wholesale market for electricity—all entities other than (a) in-state utilities that provide retail electric service within that state's borders and (b) entities that enter into contracts with such in-state utilities.

This attempt was manifested in an unconstitutional, protectionist interpretation of Florida law that is the central holding of the decision below by the Florida Supreme Court. In that decision, the Florida court overturned an order of the PSC granting a determination of need for an electrical power plant to Petitioner New Smyrna Beach and its co-applicant, Duke Energy New Smyrna Beach Power Company Ltd.,

L.L.P. ("Duke"), an Exempt Wholesale Generator ("EWG") under the Energy Policy Act.[2] The determination of need is analogous to a certificate of public convenience and necessity and is a prerequisite for obtaining the necessary state permits to construct and operate the power plant. Duke was to furnish approximately seven percent of the power plant's output to New Smyrna Beach at wholesale and planned to sell the balance of the plant's output at wholesale in interstate commerce pursuant to Duke's tariff approved by the Federal Energy Regulatory Commission ("FERC"). The Florida Supreme Court reversed the PSC's order, holding that the PSC exceeded its statutory authority in granting a determination of need because the proposed power plant's output was "not fully committed to use by Florida customers who purchase electrical power at retail rates." *Garcia*, 767 So.2d at 435.

The Florida court's opinion rests on the belief that the Florida Legislature has the authority to restrict the construction and operation of electrical power plants in Florida to in-state retail-serving utilities and to entities that contract to sell their output to such in-state utilities. The opinion thereby prohibits potential power suppliers who do not provide retail service in Florida from building and operating power plants to compete with in-state retail-serving utilities to provide cleaner and less expensive power to Florida or out-of-state utilities in the competitive interstate wholesale power market.[3] It is inescapable that the Florida court's

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[2] The PSC acted under authority granted by the Florida Electrical Power Plant Siting Act, Sections 403.501-.518, Florida Statutes (the "Siting Act") and the PSC's determination of need statute, Section 403.519, Florida Statutes.

[3] Electric power transactions at wholesale are transactions in interstate commerce, subject to regulation by the Federal Energy Regulatory Commission. *See Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) (Federal Power Commission, the precursor of the FERC, held to have jurisdiction over the transmission of power, at

interpretation—authorizing the permitting of power plants only to serve retail customers within Florida—would prohibit the use of Florida's resources by power producers seeking to compete with vertically integrated Florida utilities[4] in the interstate wholesale power market.[5]

The immediate result of the Florida court's opinion, if allowed to stand, will be higher electricity costs for New Smyrna Beach and for other utility systems inside and outside Florida that are denied the opportunity to purchase electricity from wholesale electricity providers like Duke.

A. FACTS

New Smyrna Beach is a municipal electric utility that provides service to approximately 20,000 retail customers within its service area on the upper east coast of Florida. Historically, New Smyrna Beach has purchased, at wholesale, most of the electricity that it sells to its retail customers from Florida Power & Light Co. ("FPL"), Florida Power Corp. ("FPC"), and Tampa Electric Co. ("TECO"). Duke is a Delaware limited partnership authorized to engage in the production and sale of electricity at wholesale in interstate commerce by its FERC-approved Rate Schedule No. 1. *Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.*, 83 FERC ¶ 61,316 (June 25, 1998). Duke is also certified as an Exempt Wholesale Generator by the FERC pursuant to the

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wholesale, by utility over another utility's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce); *see also* 16 U.S.C.S. §§ 824(a) & (b)(1) (1994).

[4] Vertically integrated utilities are those that engage in the generation (production), transmission, and distribution of electricity. Because they own and control facilities at all levels of utility operations, such vertically integrated utilities have incentives to favor their own generation for use on their transmission and distribution facilities.

[5] The record below showed that New Smyrna Beach and Duke had duly followed all applicable environmental permitting and siting requirements for the Project.

Energy Policy Act. *Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.*, 83 FERC ¶ 62,220 (June 9, 1998); *see* 15 U.S.C. § 79z-5a (1998).

In order to secure the benefits of lower electricity costs through increased wholesale competition, New Smyrna Beach joined with Duke for the purpose of constructing and operating a state-of-the-art, natural gas fired electrical power plant having 514 MW of nominal generating capacity. This proposed electrical power plant is known as the New Smyrna Beach Power Project ("Project"). Because of the Project's size and technology, the Siting Act required New Smyrna Beach and Duke, as joint applicants, to obtain permits for the Project pursuant to that Act. As a required part of this permitting scheme, New Smyrna Beach and Duke sought and obtained the PSC's determination of need for the Project. 99 FPSC 3:401. Among other things, the PSC found the following: (1) that New Smyrna Beach needs the Project for system reliability and for cost-effective power supply; (2) that the Project will provide benefits to Peninsular Florida's operating reliability; (3) that Duke would be a wholesale provider of electricity, from whom retail-serving utilities may elect to purchase electricity when economic to do so; and (4) that the Project will "exert a downward pressure on electricity pricing in the wholesale power market in Florida," which would, "in turn, [] flow through to retail IOU customers in retail rates . . ."[6] 99 FPSC 3: 432-33, 435, 438.

The respondents here are three incumbent, in-state, investor-owned, retail-serving utilities, TECO, FPL, and FPC (collectively "Respondents"). In the proceeding before the PSC, the Respondents opposed the Project on factual grounds and on the ground that the PSC lacked jurisdiction to grant the required determination of need for the Project because of its predominantly wholesale character. The PSC held in favor

[6] "IOU" is the common abbreviation for "investor-owned utility," meaning utilities owned by stockholders, such as FPL, FPC, and TECO.

of New Smyrna Beach and Duke on the factual issues and likewise held that, under the plain language of the applicable Florida statutes, the PSC had jurisdiction to issue a determination of need.

B. PROCEEDINGS BEFORE THE PSC; THE FEDERAL QUESTIONS

The primary case below was a proceeding before the PSC to determine whether the Project was needed pursuant to Sections 403.519 and 403.507(2)(a)2., Florida Statutes. Based on an extensive factual record and extensive briefing and oral argument, the PSC granted the requested determination of need for the Project.

New Smyrna Beach raised both the preemption and Commerce Clause issues before the PSC. The PSC found that it was not appropriate to reach a decision on the Commerce Clause issue because there was insufficient evidence in the record to fully adjudicate it (apparently referring to undue burden analysis) and that it did not have to reach a definitive conclusion on the preemption issue because the PSC's decision could be made by construing Florida's existing statutory and regulatory framework without resort to a finding of federal preemption. 99 FPSC 3:424.

C. THE DECISION BELOW

The Respondents appealed to the Florida Supreme Court, asserting that the PSC had erred in granting the requested determination of need because it lacked statutory authority to do so, and also that the PSC had erred on factual grounds in issuing its order. New Smyrna Beach responded that the PSC had an adequate factual evidentiary record to support its order and that the PSC had adequate state statutory authority to grant its order; New Smyrna Beach also presented to the Florida court the federal issues upon which this Petition is grounded. The Florida court held that the PSC exceeded its statutory authority, stating as follows:

> [W]e find that the statutory scheme . . . was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.

Garcia, 767 So. 2d at 435. Because its ruling effectively barred Petitioner and its co-applicant from obtaining the permits for a wholesale merchant power plant in Florida, the Florida Supreme Court was forced to confront the federal issues that the PSC avoided. After reviewing New Smyrna Beach's extensive arguments concerning these federal issues, the Florida court rejected New Smyrna Beach's preemption and Commerce Clause arguments in two sentences:

> We find no merit in the constitutional arguments advanced by New Smyrna. As to any alleged preemption or interference with interstate commerce, we find that power-plant siting and need determination are areas that Congress has expressly left to the states.

Id. at 436 (footnote omitted).

The Florida court likewise rejected motions for rehearing submitted by the PSC, New Smyrna Beach, and Duke.

REASONS FOR GRANTING THE PETITION

The Florida court's opinion attempting to reserve the use of Florida's resources for the purpose of participating in the electricity industry *exclusively* to the favored class of in-state retail utilities raises fundamental questions under the Commerce and Supremacy Clauses of the United States Constitution. Specifically, the Florida court's opinion directly undermines a fundamental objective of Title VII of the Energy Policy Act. Moreover, the Florida court's opinion is diametrically opposed to the fundamental principles and values underlying the Commerce Clause as articulated in numerous opinions of this Court. This Court's review of the Florida Supreme Court's decision is therefore warranted

because the Florida Court "decided an important federal question that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Also, this case raises issues relating to the strict application of state need determination requirements to what federal law has designated as a free, competitive market for wholesale power generation. These issues have never been specifically addressed by this Court. Therefore review is also warranted because the Florida Supreme Court "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Allowing the Florida court's opinion to stand will frustrate the will of Congress as articulated through the Energy Policy Act, and would lead to exactly the sort of chauvinism, isolationism, and protectionism by the states that the Commerce Clause was designed to prevent. In contravention of the Energy Policy Act, the Florida court's decision would empower the vertically integrated in-state utilities to use their retail monopoly to severely limit—or completely foreclose—competition in the wholesale power market. Moreover, the Florida court's opinion effectively gives in-state utilities "gatekeeper" authority to prevent Exempt Wholesale Generators, created by Congress to enhance competition in the interstate wholesale power market, from building plants in Florida. Giving this power to the incumbent, vertically integrated utilities directly undermines Congress's carefully crafted system, established in the Energy Policy Act, for preventing such utilities from thwarting competition in the wholesale power market.

The Florida court's opinion would allow Florida to restrict access to its natural resources—for use in interstate commerce—only to the favored class of in-state, retail-serving utilities. Other states would be permitted, if not encouraged, to similarly restrict the use of their resources in order to prevent the construction and operation of power plants that would operate in interstate commerce in order to

reserve their environmental resources for their residents, resident businesses, and incumbent, in-state utilities. The Florida court's opinion is thus unconstitutional under the Commerce Clause of the United States Constitution. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

I. REVIEW IS WARRANTED BECAUSE FEDERAL LAW PREEMPTS THE STATE FROM REQUIRING A WHOLESALE POWER SUPPLIER TO OBTAIN A CONTRACT WITH AN IN-STATE UTILITY IN ORDER TO BUILD A COMPETITIVE WHOLESALE POWER PLANT.

The Florida court's interpretation limiting applicants for a need determination to electric utilities that provide retail power in-state is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry. The Energy Policy Act of 1992 and FERC's Order 888 require public utilities that own transmission facilities to provide access to those facilities to independent power generators on a non-discriminatory basis. The Energy Policy Act also created EWGs to promote competition in the interstate wholesale power market. The Florida court's construction would require that Duke contract to sell power to an in-state utility before it can construct and operate the Project,[7] which would undermine a fundamental

[7] Certain limited classes of special-purpose power plants, including those using non-steam and non-solar technologies and small plants using steam or solar technologies, may be permitted and constructed outside the Siting Act. The existence of this opportunity to construct power plants that fall within these limited categories does not affect Petitioner's federal arguments, because the Florida court's opinion categorically forecloses access to the required permitting processes—and thus to Florida's resources—for the larger, cleaner, and more efficient power plants, like

objective of Title VII of the Energy Policy Act and Order 888, *i.e.*, to prevent vertically integrated public utilities from interfering with the development of a competitive wholesale power market. Thus both the Energy Policy Act and Order 888 preempt the Florida court's construction of Section 403.519, Florida Statutes.

The doctrine of federal preemption derives from the affirmative grant of powers to Congress and the Supremacy Clause of the United States Constitution. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Independent Energy Producers Ass'n, Inc. v. California Pub. Util. Comm'n*, 36 F.3d 848, 853 (9th Cir. 1994). As long as Congress acts within its constitutional powers, its statutes take precedence over any state law that conflicts with them. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1,210 (1824). By the same reasoning, state laws must also yield to duly promulgated federal regulations with which they conflict. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *Hillsborough County, Fla. v. Automated Med Labs*, 471 U.S. 707, 713 (1985); *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). State law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

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the Project in question here, that are best suited to participating in the competitive wholesale interstate power market.

A. Review Is Warranted Because Requiring Wholesale Utilities To Contract With An In-State Utility In Order To Build Power Plants Conflicts With The Goal Of The Energy Policy Act And Order 888 To Prevent Discrimination By Vertically Integrated Utilities.

Federal preemption may be explicit, may result from a conflict between federal and state law, or may arise when the federal regulatory provisions evidence an intent by Congress to occupy the field within which the state regulates. *Cipollone*, 505 U.S. at 516. The Florida Supreme Court's interpretation of Section 403.519, Florida Statutes, would allow incumbent utilities to frustrate completely the Congressional objective of developing an open and competitive wholesale power market. Requiring a wholesale power supplier to contract with an in-state utility as a prerequisite to being allowed to build a power plant intended to supply power to the interstate wholesale market directly and substantially undermines the purposes of Title VII of the Energy Policy Act. That purpose is to prevent vertically integrated, state-regulated utilities from discouraging federally regulated public utilities, such as Duke, from building wholesale generating facilities. *See* Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 2905-21 (1992).

The Energy Policy Act was written against a background of FERC's difficulty in unbundling generation of electricity and creating a competitive market for wholesale power. When Congress enacted the Federal Power Act, electricity was provided almost exclusively by vertically integrated state-regulated utilities which owned generation, transmission and distribution facilities. Order 888, 61 Fed. Reg. 21,539, 21,543 (1992). Utilities sold a bundled service—delivered electric energy—to retail and wholesale customers. *Id.* Recent changes in technology, and the experience of utilities

with buying power from independent qualifying facilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at 16 U.S.C. §§ 2601-2645 (1994)), indicated that generation of electricity could be provided more economically by independent producers, operating in a competitive market, without forfeiting system reliability. *Id.* at 21,543-46.

FERC, however, was limited in its ability to encourage development of independent wholesale generators by two major factors. First, FERC did not have clear authority to order vertically integrated utilities to transmit power for wholesale generators. *Id.* at 21,546. Thus, existing utilities could stymie the plans of wholesale public utilities by refusing to transmit power for them, which would isolate their generating facilities and render them incapable of delivering their power. Second, and of particular significance here, the Public Utility Holding Company Act of 1935 ("PUHCA") imposed severe restrictions on the ability of independent developers to own power projects that were not qualifying facilities under PURPA, and prohibited utilities from owning such facilities outside of the geographic area in which they provide regulated service. Title VII of the Energy Policy Act was adopted to grant FERC authority to address both of these problems.

In the Energy Policy Act's amendments to Sections 211 & 212 of the Federal Power Act, Congress granted FERC the authority to order utilities to transmit power for other generators of electricity. *See* 16 U.S.C. §§ 824j, 824k (1998). The legislative history manifests that Congress's intent in so providing was to prevent utilities with monopoly power over power transmission from interfering with FERC's efforts to create a competitive market for wholesale power. The House Report on the Energy Policy Act stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

H.R. Rep. No. 102-474(I) at 139-40 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1962-63.

FERC's Order 888 also evidences a central concern with the ability of utilities to interfere with the development of a competitive wholesale power market. In the introduction and summary on the very first page of Order 888, FERC stated that, in order for consumers to see the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly discriminate against others [i.e., competing generators].

Order 888, 61 Fed. Reg. at 21,541. The Florida court's interpretation of Section 403.519, Florida Statutes, would give in-state utilities the precise power that Congress and FERC carefully worked to eliminate. Under that reading, because Florida's retail utilities cannot be forced to sign contracts for purchases of power from wholesale utilities like Duke, 99 FPSC 3:437-38, the in-state retail utilities retain the power to act as "gatekeepers" and prevent such wholesale utilities from building generating facilities at all. Transmission guaranteed by the Energy Policy Act is not worth anything if a wholesale utility cannot build a plant to generate power in the first place.

B. Review Is Warranted Because Requiring Wholesale Utilities To Enter Into Contracts With In-State Utilities Undermines The Energy Policy Act's Goal Of Facilitating Provision Of Wholesale Power By Experienced, Competitive Power Producers.

Requiring that wholesale utilities, like Duke, enter into contracts with in-state retail utilities before applying for a determination of need would also undermine the purpose of the Energy Policy Act to provide for wholesale public utilities, such as Duke, to be exempted from the requirements of PUHCA. Prior to the Energy Policy Act, PUHCA greatly restricted the structure of, and limited utility investment in, affiliated wholesale utilities like Duke. PUHCA subjected any such producer that was affiliated with a utility to onerous regulation by the Securities Exchange Commission. *See generally* 15 U.S.C. §§79a-79z-6 (1998). The legislative history of the Energy Policy Act demonstrates that Congress was especially concerned that PUHCA would discourage experienced power producers from building generating facilities. *See* H.R. Rep. No. 102-474(I) at 139 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1962. Thus, in adopting section 711 of the Energy Policy Act, 15 U.S.C. §79z-5a (1998), Congress created a new entity relative to PUHCA, the "Exempt Wholesale Generator" or "EWG", specifically to allow companies like Duke to use their expertise to develop and operate competitive wholesale generating facilities. Construing Florida law to allow existing in-state retail utilities to veto the building of power plants by affiliates of out-of-state utilities directly interferes with Congress' objective to allow experienced companies to build and operate wholesale generating facilities.

Congressional intent that states not be allowed to burden the building of EWG facilities dispositively preempts the states from imposing such burdens. *See California Savings &*

Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (stating that the Court's role in preemption cases is to ascertain the intent of Congress). When Congress passed the Energy Policy Act, it fully recognized that the Act would affect the criteria that states historically considered in approving a state-regulated utility's construction of power generation facilities. The Energy Policy Act explicitly allows the states to retain jurisdiction to guard against environmental harm that building a plant might entail, and to determine siting issues raised by an application to build such a plant.

C. The Energy Policy Act Provision Clarifying That The Act Does Not Affect State Authority Relating To Environmental Protection Or Siting Of Generation Facilities Does Not Authorize The Florida Supreme Court's Interpretation Of The State's Need Determination Statute.

The Florida Supreme Court dismissed contentions that its interpretation of the state need determination statute was inconsistent with both the Commerce Clause and the Energy Policy Act because that Act explicitly reserves to states continued jurisdiction to regulate the environmental impacts and siting of merchant plants. *See Garcia*, 767 So. 2d at 436; 15 U.S.C. §79 note (1998). In essence, the Florida Supreme Court concluded that a need determination is part of the environmental assessment of a proposed power plant, which the Energy Policy Act explicitly left within states' authority. This conclusion hinges on the assumption that one cannot assess environmental impact without balancing it against need. But the structure of the Siting Act belies this assumption.

The determination of need is *not* part of the balancing of environmental impact; it is a *precondition* for an applicant being allowed to present evidence about the environmental impact of its project to the Siting Board. *See* § 403.507(3),

Fla. Stat. No matter how environmentally beneficial a proposed wholesale merchant plant may be, and no matter how consistent the plant would be with surrounding land uses, under the Florida court's interpretation, the plant will never be considered by the state Siting Board unless the applicant is first able to show that there is demand in Florida for the plant's power, a showing that merchant plants who do not contract with Florida retail utilities are never even given an opportunity to make. The Florida court's application of need determinations to merchant plants serves no purpose other than to insulate incumbent, in-state retail utilities from competition in the wholesale power market. The Energy Policy Act provision regarding state authority over environmental and siting matters was never intended to allow states to discriminate against out-of-state applicants or to interfere with the fundamental operation of a competitive interstate wholesale power market.

II. REVIEW IS WARRANTED BECAUSE THE FLORIDA SUPREME COURT'S INTERPRETATION OF FLORIDA LAW VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution prohibits any state from discriminating against or unnecessarily burdening interstate commerce. Under the Florida Supreme Court's interpretation of state statutes governing the permitting of new electrical generation facilities in the state, wholesale power suppliers like Duke may construct and operate a merchant power plant in Florida *only* if it first contracts with an in-state retail utility, which (according to the Florida Supreme Court) is the only type of entity entitled to apply to the PSC for a determination of need. The exclusionary effect of this interpretation is clear from the face of the Florida Supreme Court's opinion: "A determination of need is presently available only to an

applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all the electrical power to be generated at a proposed plant." *Garcia*, 767 So.2d at 434.

This interpretation interferes with interstate commerce on two levels. First, a company proposing to build a merchant plant in Florida cannot sell some of that power to users in other states because the PSC may not grant a "determination of need for a proposed power plant output that is not fully committed to use by Florida customers." *Id.* at 435. Second, even if a company entering the wholesale power market in Florida agrees to sell all the electrical power generated by a proposed merchant power plant to buyers within Florida, it still may not obtain the required determination of need unless it first agrees to sell that power to existing in-state retail utilities. Under the Florida Supreme Court's interpretation of Florida law, it is therefore impossible for any out-of-state entity to enter the wholesale market for electrical power in Florida without first obtaining the permission of a potential in-state competitor—regardless of where the power eventually will be sold.

This interpretation of Florida law gives existing in-state utilities unconstrained authority under state law to block new entrants to the Florida wholesale electrical power market, which in turn ensures that in-state utilities will maintain a *total monopoly* on all wholesale electrical power generation within the state. Existing in-state utilities may bar out-of-state companies from competing in the Florida market simply by refusing to apply for a determination of need on behalf of an out-of-state corporation. Or, conversely, in-state utilities can demand from new market entrants economic benefits to which the in-state utilities would not otherwise be entitled in exchange for presenting an out-of-state company's determination of need application to the PSC. Each of these alternatives distorts the market, establishes a legal regime that

clearly favors local corporations, and is therefore inconsistent with the basic Commerce Clause principle that no state may use its regulatory authority to isolate its own corporations from interstate competition.

The dormant (or "negative") Commerce Clause doctrine imposes a judicially enforceable limit on the extent to which a state may regulate commerce coming into or leaving that state. The dormant Commerce Clause limit on state regulatory authority is drawn directly from the Constitution, and therefore applies even in the absence of any federal statute preempting a particular state regulation. "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, unless such regulation has been preempted or expressly authorized by Congress." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3rd Cir. 1995).

The dormant Commerce Clause creates a national economic marketplace in every commercial commodity, including electricity. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)(striking down as a violation of the dormant Commerce Clause a New Hampshire Public Utilities Commission order banning the export of locally produced hydroelectric power). The principle governing dormant Commerce Clause cases is simple and virtually absolute: "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988). Any state statute or regulation that functions primarily to provide economic benefits to in-state corporations is therefore unconstitutional. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either

into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949). In this case, New Smyrna Beach does not challenge the Florida health, safety, and environmental laws applicable to power generation facilities, and New Smyrna Beach (and Duke) intend to comply with these laws in every respect. Indeed, New Smyrna Beach and Duke followed all applicable permitting requirements for the Project until the Florida court's decision stopped them. But an interpretation of Florida law that prohibits wholesale utilities like Duke from *even applying* for a determination of need without first contracting with an in-state utility is related to neither health, safety, nor the environment; it is pure economic protectionism, and therefore is prohibited by the dormant Commerce Clause.

State laws can conflict with dormant Commerce Clause mandates in two ways: by discriminating against out-of-state commerce, and by unreasonably burdening interstate commerce. The exclusionary interpretation of Florida law adopted by the Florida Supreme Court is unconstitutional under both categories of dormant Commerce Clause jurisprudence.

A. The Florida Supreme Court's Interpretation Of Florida Law Discriminates Against Out-Of-State Commerce.

Requiring out-of-state wholesale power suppliers to contract with an in-state utility before obtaining a determination of need overtly discriminates against *unaffiliated* out-of-state companies seeking to enter the wholesale market for electrical energy in Florida. State laws that overtly discriminate against out-of-state competitors of in-state companies are virtually impossible to justify under the Commerce Clause. "[W]here simple economic protectionism

is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under the Florida Supreme Court's exclusionary interpretation of Florida law, out-of-state companies who refuse to enter into binding contracts with in-state utilities are totally barred from obtaining a determination of need, and therefore are totally barred from doing business in Florida as wholesale producers of electrical power. This interpretation of Florida law fits precisely this Court's description of a clear dormant Commerce Clause violation. "The clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Id.* at 624.

This Court has held unconstitutional many examples of state regulations that have attempted to give local economic interests a competitive advantage by requiring anyone doing business in the state to channel part of their business to the local companies. *See C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994)(striking down a local ordinance barring local waste recycler from shipping nonrecyclable waste to out-of-state processor); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)(striking down a state statute requiring utilities to buy designated percentage of local coal); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984)(striking down a state statute requiring companies exporting timber from Alaska to process timber at local processing plants); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)(striking down a state statute requiring shippers to package cantaloupes in Arizona before being shipped out of state); *Toomer v. Witsell*, 334 U.S. 385 (1948)(striking down a state statute requiring shrimp fishermen to unload, pack, and stamp shrimp in South Carolina before shipping them out of state); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (striking down a state statute requiring shrimp to be hulled in Louisiana before being shipped out of state).

Although these cases extend over seven decades, and involve many different industries, the underlying theme is consistent: neither a state nor one of its agencies may discriminate against interstate commerce, regardless of whether the discrimination takes the form of a direct ban on out-of-state competitors, a statutory requirement that out-of-state businesses join with in-state businesses before doing business within the state, or the selective application of otherwise legitimate certification requirements. This theme has been applied to cases analogous to the present one for many years. For example, denying competitive wholesale utilities like Duke applicant status or requiring such wholesale utilities to contract with an in-state utility for the full output of the proposed power plant to obtain a determination of need would be indistinguishable from an equally exclusionary certification requirement struck down over seventy years ago in *Buck v. Kuykendall*, 267 U.S. 307 (1925). In that case, the State of Washington required all common carriers using the state's highways over certain routes to obtain a certificate of public convenience and necessity. *Id.* at 313. Although the applicant had received a similar certificate from Oregon, and asserted his willingness to comply with all applicable Washington state regulations concerning common carriers, Washington denied the certificate on the ground that the route was already being adequately served. *Id.* In an opinion by Justice Brandeis, the Supreme Court struck down the certification requirement. The Court noted that the purpose of the requirement "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." *Id.* at 315-16.

The Supreme Court has recently reaffirmed *Buck* as an example of unlawful state discrimination against interstate

commerce. *See Carbone*, 511 U.S. at 394; *see also Medigen of Kentucky, Inc. v. Public Service Comm'n of West Virginia*, 985 F.2d 164, 167 (4th Cir. 1993) (striking down a state's requirement that a transporter of medical waste obtain a certificate of convenience and necessity, and noting that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose"). Moreover, excluding wholesale utilities like Duke from the determination of need process would interfere with interstate commerce even more directly than the certification requirement struck down in *Buck*, because in this case, such wholesale utilities would be prohibited from even applying for a determination of need unless they contract with in-state retail utilities for the full output of the Project. Thus, in the absence of an agreement with an existing Florida utility, such utilities would be entirely barred even from asking the Commission for permission to enter the Florida wholesale market.

It is irrelevant for purposes of dormant Commerce Clause analysis that wholesale utilities like Duke could eventually enter the Florida market *after* contracting with an in-state utility to obtain a determination of need. Any discriminatory state action that is intended or that has the effect of protecting local interests is sufficient to trigger the application of the Commerce Clause, even if that action merely imposes extra costs on an out-of-state entity. "The volume of commerce affected [by an exclusionary state regulation] measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Wyoming*, 502 U.S. at 455. Thus, even a minor economic effect on the operation of out-of-state wholesale utilities would constitute a violation of the dormant Commerce Clause if that effect tends to favor local economic interests. Such an effect is inevitable if wholesale utilities are forced to contract with in-state utilities to apply for a determination of need on their behalf. The requirement that

such utilities enter contracts that might not be economically advantageous for them would itself constitute an impermissible impact on interstate commerce. At a minimum, in-state utilities are not likely to undertake the task of applying for a determination of need on behalf of wholesale utilities like Duke without demanding some compensation in return. Thus, a wholesale utility like Duke would be forced to compensate the in-state utility for its assistance, and this compensation would necessarily raise the cost of providing power to the wholesale market. In-state utilities who could themselves apply for a determination of need would therefore obtain an economic advantage over out-of-state competitors such as Duke in serving the market for wholesale electrical power. This Court has consistently held that the dormant Commerce Clause prohibits states from using their regulatory authority in this way to skew a particular economic market in favor of local interests.

No local policy interest supports the Florida Supreme Court's exclusionary interpretation of Florida law other than the policy of providing Florida retail utilities a monopoly over wholesale electrical power generation. This interest directly conflicts with the most basic precepts of this Court's Commerce Clause jurisprudence. As noted above, it is virtually impossible to justify discriminatory restrictions on interstate commerce. *See Philadelphia*, 437 U.S. at 624 (noting "a virtually per se rule of invalidity" for protectionist statutes). Such restrictions may not be justified under any circumstance if the state cannot demonstrate that its legitimate local interests could not be protected through a nondiscriminatory alternative regulatory scheme. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. The legitimate interests served by the Florida need determination statute—

ensuring reliability and adequate cost-effective power—can be more than adequately served by allowing wholesale utilities, like Duke, to apply directly to the PSC without first contracting with in-state utilities for the entire capacity of their plants. Since protecting the economic interests of in-state retail utilities is the only possible interest served by the Florida Supreme Court's interpretation of the Florida need determination statute, that interpretation is per se invalid.

Finally, the fact that the Florida Supreme Court's interpretation of the Florida need determination process might hypothetically affect in-state wholesale utilities as well as out-of-state wholesale utilities such as Duke does not cure the unconstitutional discrimination inherent in the interpretation. This Court has held repeatedly that a discriminatory statute "is no less discriminatory because in-state or in-town [companies] are also covered by the prohibition." *Carbone*, 511 U.S. at 391; *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992)(striking down a Michigan landfill regulation, even though the regulation disadvantaged some Michigan commerce as well as interstate commerce); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)(striking down a Madison, Wisconsin ordinance requiring local inspection of milk, even though the ordinance affected milk imported from other parts of Wisconsin, as well as milk from other states). It is also irrelevant that the Florida court's interpretation does not disadvantage some out-of-state companies, in the sense that some out-of-state companies may choose voluntarily to join with an in-state utility to seek a determination of need for a new merchant power plant. "[T]he mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." *Division of Alcoholic Beverages and Tobacco, et al. v. McKesson Corp.*, 524 So.2d 1000, 1007 (Fla. 1988)(holding that protectionist excise tax violated dormant Commerce Clause, but refusing

to force state to refund unconstitutionally collected tax), *rev'd in part*, 496 U.S. 18 (1990)(requiring state to refund unconstitutionally collected tax).

In sum, it is impossible under longstanding dormant Commerce Clause precedents to justify the requirement that wholesale utilities like Duke contract with a Florida utility before applying for a determination of need: The requirement overtly discriminates in favor of existing Florida utilities, it has no legitimate justification that cannot be satisfied by nondiscriminatory means, and it cannot be justified on the ground that other Florida independent power producers might also be affected by the requirement. The only possible conclusion, therefore, is that the Florida Supreme Court's exclusionary interpretation of Section 403.519, Florida Statutes, constitutes unconstitutional discrimination in violation of the dormant Commerce Clause, and Duke with its co-applicant New Smyrna Beach should be permitted to apply directly for a determination of need for the Project.

B. The Florida Supreme Court Ruling Impermissibly Burdens Interstate Commerce.

Because the requirement that wholesale utilities like Duke contract with an in-state utility before applying for a determination of need constitutes unconstitutional discrimination against interstate commerce, it is unnecessary to consider whether the requirement would unconstitutionally burden interstate commerce. *See Carbone*, 511 U.S. at 390 (holding that courts "need not resort to" burden category of dormant commerce clause analysis if statute is found to discriminate against interstate commerce). In this case, however, applying the burden category of dormant Commerce Clause analysis would produce the same result as the discrimination analysis: *i.e.*, that the Florida Supreme Court's interpretation of Section 403.519, Florida Statutes, is unconstitutional.

This second category of dormant Commerce Clause analysis limits the extent to which states can indirectly burden interstate commerce, even if there is no evidence of local favoritism or discrimination against interstate commerce. The most frequently cited statement of the burden analysis is found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986) ("we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

In this case the Florida Supreme Court's interpretation of Florida law fails every aspect of the *Pike* burden test. Requiring wholesale suppliers to contract with in-state retail utilities before applying for a determination of need is not evenhanded, the requirement's effect on interstate commerce is not incidental, the burden on commerce outweighs the putative local benefits, and the legitimate local interests represented by the determination of need process can be protected through means that have a much lower impact on interstate activities.

The discussion in the previous section demonstrates why the Florida Supreme Court's interpretation of Section 403.519, Florida Statutes, is not evenhanded in its treatment

of in-state and out-of-state participants in the market for wholesale electrical power. Under the Florida Supreme Court's proposed interpretation, the only way an out-of-state company can enter the market for wholesale electrical power is by entering into a contract with an in-state utility to obtain the necessary determination of need. This imposes a major burden on commerce because it imposes additional costs on out-of-state applicants and forces them to give up a measure of control over the regulatory decisions that dictate how and when a new generation facility will be built.

The only legitimate interest that can be asserted in favor of the determination of need process for wholesale merchant plants is ensuring electric system reliability and integrity. *See* Fla. Stat. § 403.519. This interest can be satisfied by requiring the PSC to deal with such wholesale applicants directly instead of through a local intermediary. There is, of course, another possible interest to justify prohibiting out-of-state wholesale utilities from applying for a determination of need directly, *i.e.*, to protect local economic interests from out-of-state competition in the wholesale market for electricity. This interest constitutes pure economic protectionism, however, and is therefore inconsistent on its face with the dormant Commerce Clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980).

Under the dormant Commerce Clause, the scope of a state's legitimate authority with regard to wholesale electrical generation facilities is necessarily more limited than its authority with regard to new generation facilities being proposed by in-state utilities subject to retail rate regulation. Thus, a decision to permit Duke and other wholesale power generators to apply directly for a determination of need would not imply any constitutional limit to the PSC's existing authority to regulate in-state retail utilities. The PSC's greater authority with regard to in-state retail utilities is consistent with the dormant Commerce Clause because it is necessary to protect the ratepayers who will be forced to bear

the cost and the risk of a local utility's power plants. This interest has been recognized in federal statutes that specifically grant states the authority to regulate retail utilities, while encouraging the development of a free market in wholesale merchant power plants. The states' interests in the regulation of retail utilities are simply not relevant to wholesale merchant utilities' applications because those wholesale utilities will assume the full cost and risk of the facility.

Permitting wholesale utilities to apply directly for a determination of need infringes on none of the state's legitimate regulatory interests. Conversely, requiring wholesale utilities like Duke to contract with an in-state utility to apply for a determination of need would directly burden interstate commerce in a manner that favors local economic interests and disadvantages competitors from outside the state. The burden this requirement imposes on interstate commerce clearly exceeds the local benefits; therefore the Florida Supreme Court's exclusionary interpretation of Section 403.519, Florida Statutes, is unconstitutional under the burden category of dormant Commerce Clause jurisprudence.

CONCLUSION

For the reasons set forth in this Petition, the writ of certiorari should be granted.

Respectfully submitted,

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